

Purnell's Pride, Inc. and United Food and Commercial Workers International Union, AFL-CIO, Local P-1224. Case 26-CA-6869

December 16, 1982

**SECOND SUPPLEMENTAL DECISION
AND ORDER**

BY MEMBERS FANNING, JENKINS, AND
ZIMMERMAN

On September 11, 1980, the National Labor Relations Board, pursuant to a remand by the Court of Appeals for the Fifth Circuit,¹ issued a Supplemental Decision and Order in the above-entitled proceeding² reaffirming its original Decision and Order³ in which it found that Respondent had violated Section 8(a)(5) and (1) of the Act and ordered Respondent to bargain with the Union. Thereafter, on September 26, 1980, Respondent filed a motion for reconsideration and to reopen the record requesting, *inter alia*, that the record in this proceeding be reopened so that Respondent might offer additional evidence concerning its objections to the May 13, 1977, election. Such objections alleged that during the election campaign the Petitioner-Union made certain misrepresentations which, under the standard set forth in *General Knit of California, Inc.*,⁴ warranted setting aside the election.⁵ On May 7, 1981, Respondent's motion was denied. Thereafter, the Board petitioned the Court of Appeals for the Fifth Circuit for enforcement of its Supplemental Decision and Order.

However, on June 1, 1982, the Board petitioned the Fifth Circuit to withdraw the application for enforcement and, on June 15, 1982, the court granted the Board's motion to withdraw its application for enforcement. On August 10, 1982, the Board notified the parties that it had decided, *sua sponte*, to reconsider its decision in this proceeding and, on August 26, 1982, Respondent filed a statement of position.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the Na-

tional Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

In its statement of position Respondent challenges the Board's unit determination, its July 28, 1977, denial of Respondent's request for review in Case 26-RC-5479 insofar as it relates to Objections 1 and 6, and the status of the United Food and Commercial Workers International Union, AFL-CIO, Local P-1224, as the successor of Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, Local P-1224. For the reasons set forth below, we reaffirm the denial of review in Case 26-RC-5479, our Decision and Order reported at 234 NLRB 197 (1978), and our Decision and Order reported at 252 NLRB 110 (1980).

With respect to the appropriate unit, we reaffirm our finding in 252 NLRB 110 that a unit consisting of production employees at Respondent's Straus Street facility and all maintenance employees at Respondent's Tupelo facilities constitutes an appropriate unit.⁶ For the reasons fully set forth in that Decision, we reaffirm our finding that these employees share a sufficiently distinct and separate community of interest to warrant a separate unit.

With respect to the objections, Objection 1(a)-(h) lists a number of misrepresentations which Respondent alleged warranted setting aside the election:

(a) Distributing literature which misrepresented Section 7 of the National Labor Relations Act concerning the rights of the employees and created the impression that the United States Government was supporting the Union and desired that the employees also support the Union.

(b) Guaranteeing that the Employer would not be able to take away any benefits during the collective-bargaining process which were presently enjoyed by the employees.

(c) Guaranteeing that the employees would elect a bargaining committee which would make the same demands as those made in other plants where it represented employees.

(d) Guaranteeing that over 500,000 of its members can "buy a lot more groceries with

¹ 609 F.2d 1153 (5th Cir. 1980).

² 252 NLRB 110.

³ 234 NLRB 197 (1978).

⁴ 239 NLRB 619 (1978). This decision, which overruled the Board's Decision in *Shopping Kart Food Market, Inc.*, 228 NLRB 1311 (1977), issued approximately 11 months after the unfair labor practice proceeding herein and nearly 1-1/2 years after the Union was certified as the collective-bargaining representative for the unit found appropriate herein. Thus, the rule enunciated in *Shopping Kart* represented Board law at the time of both the representation and unfair labor practice proceedings and was relied on by the Regional Director in overruling Respondent's objections.

⁵ In Case 26-RC-5479, the Regional Director for Region 26, on June 24, 1977, overruled Respondent's objections to the May 13, 1977, election. Thereafter, Respondent filed a request for review of the Regional Director's Decision and Certification, which was denied by the Board on July 28, 1977.

⁶ The appropriate unit is:

All production employees employed at the Employer's poultry processing plant on Straus Street in Tupelo, Mississippi, including all unloaders, loaders, killers, eviscerators, cutters and packers, and all general maintenance employees employed by the Employer at its Tupelo, Mississippi, facilities; excluding all office clerical employees, local and over-the-road truckdrivers, hatchery employees, commercial egg processing employees, feed mill and by-products plant employees, dry warehouse employees, refrigerated warehouse employees, breeder farm employees, live haul department employees and supervisors as defined in the Act.

their paycheck" than the Employer's employees were able to purchase with their paycheck.

(e) Distributing literature misrepresenting the wages, hours, and working conditions which are in effect at another employer's plant also located in Tupelo, Mississippi.

(f) Claiming credit for the wages, hours, and working conditions which are in effect at another employer's plant also located in Tupelo, Mississippi.

(g) Distributing literature misrepresenting the Employer's method of wage increases and/or decreases.

(h) Claiming that a majority of employees had signed authorization cards asking to be represented by the Union.

The Regional Director overruled this objection in its entirety, finding that said misrepresentations, even if made, would not warrant setting aside the election under *Shopping Kart Food Market, Inc.*,⁷ which was at that time the applicable standard. Respondent attacks this finding in three respects. First, Respondent claims that it is not clear whether the Board's recent return to the *Shopping Kart* standard for misrepresentations in *Midland National Life Insurance Company*⁸ should be given "retroactive" effect in this case. Second, Respondent argues that, regardless of whether the *Shopping Kart* or *Midland National* standard for misrepresentations is applied to the objection, the Regional Director erred in refusing to fully investigate the objection and to accept documents in support of the objection. Finally, Respondent claims that such refusal resulted in the failure of the Board to fully consider both its allegation that the Union made misrepresentations concerning Board processes and its "allegations of forgery," allegations which Respondent contends would warrant setting aside the election despite the recent holding in *Midland National*.

To the extent that Objection 1 alleges that certain statements made by the Union during the campaign constitute material misrepresentations, we reaffirm the Regional Director's finding that such allegations do not warrant setting aside the election. All of the allegations, with the arguable exceptions of Objection 1(a) and (b), on their face allege conduct not objectionable under *Shopping Kart*, which was Board law at the time of the representation and unfair labor practice proceedings and which is presently the law under *Midland National*. However, we do not view this reaffirmation as giving retroactive effect to *Midland National*. Rather, we are merely reaffirming a decision predi-

cated upon the legal standard which was applicable both at the time of the original proceedings and at present.⁹ The mere fact that, during an intervening period, the Board adhered to a different standard does not, in our view, provide any sound basis for reopening this matter and applying a different rule.

We next consider Respondent's contention concerning the allegations of misrepresentation of Board processes and the forgery issue. Objection 1(a) and (b) alleges that the Union distributed literature which misrepresented employees' Section 7 rights by "guaranteeing that the Employer would not be able to take away any benefits during the collective-bargaining process which were presently enjoyed by the employees."¹⁰ Respondent alleges that this statement is objectionable under the Board rule enunciated in *Formco, Inc.*¹¹ However, in *Affiliated Midwest Hospital Incorporated d/b/a Riveredge Hospital*,¹² a Board majority overruled *Formco* and held that misrepresentations of Board actions, as opposed to alteration of Board documents, should be treated as any other misrepresentations and evaluated under the standards set forth in *Midland National Life*.¹³ Moreover, even applying the standard of *Formco*, the above statement on its face does not in any way involve the Board or its processes within the meaning of that case. Even when the Board adhered to the *Formco* standard, such misrepresentations of Board law as alleged here were treated in the same manner as any other misrepresentations of fact.¹⁴ Thus, at the time of the representation and unfair labor practice proceeding and at present such a statement, even if made, would not warrant setting aside the election. Accordingly, we reaffirm our conclusion that the Regional Director properly overruled that part of Objection 1.

As to the issue of forgery, in its statement of position Respondent alludes to "allegations of forgery" made in its objections which were not addressed by the Regional Director. A review of the record, however, reveals that no allegations of

⁹ Members Fanning and Jenkins adhere to their dissenting opinions in *Shopping Kart* and *Midland National*, but consider themselves institutionally bound to apply the majority standard of *Midland National* until such time as it is overruled.

¹⁰ Respondent, in its request for review and in its statement of position here, offers no other evidence with respect to Objection 1(a) and (b). We note that the literature which included this statement, along with other statements which are alleged as objectionable under Objection 1, were attached by Respondent to its request for review and were before the Board in the original proceeding.

¹¹ 233 NLRB 61 (1977).

¹² 264 NLRB 1094 (1982) (Members Fanning and Jenkins dissenting).

¹³ Although Members Fanning and Jenkins adhere to their dissenting opinion in *Riveredge Hospital*, they consider themselves institutionally bound to apply the majority standard expressed in that case until it is overruled.

¹⁴ See, e.g., *Robbins & Myers, Inc.*, 241 NLRB 102 (1979); *LOF Glass, Inc.*, 249 NLRB 428 (1980).

⁷ 228 NLRB 1311 (1978).

⁸ 263 NLRB 127 (1982) (Members Fanning and Jenkins dissenting).

forgery have been made at any time in this proceeding. In its request for review, Respondent alleges merely that it was "prevented from showing that [certain] documents may have been forged" and that the Board should direct the Regional Director to "determine whether any of them are forgeries." Although Respondent contends that the Regional Director improperly failed to accept or consider certain documents, Respondent at no time submitted these documents to the Board, either with its request for review or subsequently. Nor is there any indication in the Regional Director's Supplemental Decision and Certification that Respondent offered any evidence concerning forged or altered documents. Indeed, Respondent in its request for review neither makes a claim of forgery nor offers proof to support such an allegation. Rather, Respondent contends that the Regional Director should have viewed documents which "may have been forged" and "determine[d] whether any of them are forgeries." Thus, Respondent would require the Regional Director to, in effect, seek out evidence of objectionable conduct when no allegation of wrongdoing has been made. Absent specific allegations of objectionable conduct, however, the Regional Director was not required to seek out evidence which would warrant setting aside the election.¹⁵ Accordingly, in the absence of an allegation of forgery, the Regional Director did not err in failing or refusing to further investigate in this regard.

Respondent's final contention concerning Objection 1 is a "catchall" claim that the Regional Director erred by failing to take affidavits or to receive and investigate certain documents allegedly offered in support of its objection. Respondent claims that it "diligently sought to have the Regional Director take affidavits and accept specific evidence concerning its Objections," and that his failure to do so deprived Respondent of "any meaningful opportunity to be heard." Yet as noted above Respondent's allegations of objectionable conduct in Objection 1, even if true, do not on their face constitute conduct warranting setting aside the election. And Respondent does not allege that these documents, which have never been submitted by it at any time subsequent to the Regional Director's Decision and Certification,¹⁶ contain any objectionable material in addition to that specifically referred to in Objection 1. Rather, Re-

spondent in effect claims that it was error for the Regional Director to refuse to accept documents or take affidavits in an effort to seek out objectionable conduct. We do not agree. Absent an allegation of misconduct, the Regional Director is not obligated to engage in a fishing expedition, taking affidavits and examining documents, for the purpose of uncovering objectionable conduct.¹⁷ Moreover, even at this stage of the proceeding Respondent has not seen fit to make an offer of proof in connection with the documents allegedly rejected. Accordingly, we see no reason to reverse our finding that the Regional Director did not err in overruling Objection 1 without further investigation.

Objection 6 alleges that certain rank-and-file employees who were union adherents "engaged in mass and rampant electioneering by means of threats and intimidation as voters stood in line to vote." In support of this objection, Respondent offered the affidavits of three of its supervisors which, according to Respondent, contained evidence that two employees remained in the voting area for a "substantial period of time" after voting and engaged in "sustained conversations" with employees waiting to vote. The Regional Director, noting that there was no evidence concerning the content of their conversations or that these employees were agents of the Union, concluded that, even if such conduct occurred, it constituted insufficient grounds for setting aside the election. In so doing, he relied on the Board's holding in *Masoneilan International, Inc.*¹⁸ We agree. Mere conversations between voters who are not "representatives of any party" do not *per se* warrant setting aside under the Board rule set forth in *Milchem, Inc.*¹⁹ Such conduct by rank-and-file employees is insufficient to warrant setting aside the election.²⁰ Accordingly, we reaffirm the Regional Director's finding overruling this objection.

Finally, Respondent contends that it should not be required to bargain with the United Food and Commercial Workers until the Board has reopened the record and taken evidence as to whether the Amalgamated Meat Cutters and Butcher Workmen

¹⁵ *N.L.R.B. v. Claxton Manufacturing Company, Inc.*, *supra*.

¹⁶ 223 NLRB 965 (1976).

¹⁷ 170 NLRB 362 (1968).

²⁰ See, e.g., *Masoneilan International, Inc.*, *supra*; *Dumas Brothers Manufacturing Company, Inc.*, 205 NLRB 919, 929 (1973); *N.L.R.B. v. Campbell Products*, 623 F.2d 876 (3d Cir. 1980). See also *Season-All Industries, Inc. v. N.L.R.B.*, 654 F.2d 932 (3d Cir. 1981). Respondent's reliance on *N.L.R.B. v. Carroll Contracting and Ready-Mix, Inc.*, 636 F.2d 111 (5th Cir. 1981), is misplaced. In that case, the employees were found to be electioneering and the court held that such conduct warranted setting aside the election if it "disrupted the voting procedure or destroyed the atmosphere necessary to the exercise of a free choice in the representation election." Here, however, Respondent does not offer any evidence that the employees were in fact electioneering at all. See *EDS-IDAB, Inc. v. N.L.R.B.*, 666 F.2d 971 (5th Cir. 1982).

¹⁵ See *N.L.R.B. v. Claxton Manufacturing Company, Inc.*, 613 F.2d 1364 (5th Cir. 1980).

¹⁶ Indeed, we note that in its request for review Respondent attached two pieces of campaign literature containing statements which clearly encompass many of the allegations of Objection 1. There is no claim that the Regional Director refused to receive this evidence and, in any event, these documents were before us at all stages of this proceeding.

of North America, the Union originally certified as the employees' representative, is still in existence and whether there is a successor union "which can assume the [Meat Cutters] position as collective bargaining representative." In several cases the Board has found that, by virtue of the merger of the Meatcutters and the Retail Clerks, the United Food and Commercial Workers constitutes the lawful successor of these Unions.²¹ Respondent offers no evidence which would warrant denying such status to the Union herein. Accordingly, we reaffirm our May 7, 1981, Order denying Respond-

ent's motion to reopen the record with respect to this matter.

In view of our findings above, we hereby reaffirm our original conclusions of law and Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby reaffirms its Decision and Order in this proceeding (reported at 234 NLRB 197) and orders that the Respondent, Purnell's Pride, Inc., Tupelo, Mississippi, its officers, agents, successors, and assigns, shall take the action set forth therein.

²¹ *Texas Plastics, Inc.*, 263 NLRB 394 (1982); *St. Mary's Home, Inc. t/a St. Mary's Infant Home*, 255 NLRB 1139 (1981); *Warehouse Groceries Management, Inc.*, 254 NLRB 252 (1981).